

No. 83-1143
IN THE
Supreme Court of the United States

October Term, 1983

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,
Petitioners
vs.

COUNTY OF ALLEGHENY,

SOLOMON AND TESLOVICH, INC., and
RAM CONSTRUCTION CO., INC.
Respondents

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF
PENNSYLVANIA**

JAMES H. McLEAN
Solicitor for the COUNTY OF
ALLEGHENY, Respondent

SAMUEL P. KAMIN
Assistant Solicitor for the COUNTY
OF ALLEGHENY, Respondent

ALLEGHENY COUNTY LAW
DEPT.
1200 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219

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STATEMENT OF THE CASE

The matter before this Honorable Court arises out of the construction of an extension to Taxiway N-1 at the Greater Pittsburgh International Airport in Findlay Township, Allegheny County, Pennsylvania, during the summer of 1979. On July 18, 1979, the County of Allegheny (hereinafter "Respondent") entered into a contract with Solomon and Teslovich (hereinafter "Solomon") relating to the extension of taxiway N-1 at the Greater Pittsburgh International Airport. As part of that contract, Solomon was authorized to remove coal which it encountered to a designated waste area or to take possession of the coal and dispose of it off the airport property at its own expense. On the same date, Solomon assigned all of its right, title and interest in the contract to Ram Construction Co., (hereinafter, "Ram") and Ram assumed and agreed to perform all the duties and obligations to be performed by Solomon. Pursuant to the assignment, Ram then entered upon the work provided for in the contract and removed coal from the property.

The alleged claim of title to the subsurface minerals by the estate of Mike Mazzaro, Deceased, is based upon the following facts which were stipulated by the parties in the Common Pleas Court of Allegheny County, Pennsylvania. On February 17, 1955, Mazzaro purchased from the Cosgrove Coal Company (hereinafter "Cosgrove") approximately 104 acres of land in Findlay Township, Pennsylvania. The deed from Cosgrove to Mazzaro excepted and reserved to Cosgrove all the coal, gas, oil, limestone, and other minerals underlying the land conveyed. Thereafter, on March 4, 1958, the County adopted a resolution authorizing the acquisition by condemnation of approximately 88 acres of Mazzaro's land for the purpose of maintaining and establishing air navigation and terminal facilities. By a second resolution dated May 5, 1959, the County was authorized to acquire by condemnation the remaining acres.

A Petition for the Appointment of Viewers was thereafter filed as to both parcels of land at No. 1528 July Term, 1961, in the Allegheny County Court of Common Pleas, and on May 4, 1961, viewers were duly appointed. Having given the notice required by law, including legal advertisements in the Pittsburgh Press, Post-Gazette and Legal Journal, on the 19th of October, 1961,

the viewers made an award to Mazzaro in the amount of \$71,989.00. The viewers did not apportion the award for any interest Cosgrove may have had in the property. This award became final on October 19, 1961, as the result of a court order which was not appealed; and Mazzaro was then paid.

In September of 1965 Kirk Industries, Inc. (hereinafter "Kirk"), Cosgrove's successor-in-interest, quitclaimed to Mazzaro all of its right, title and interest in the coal and other minerals underlying eight parcels of land including the 104 acres involved in these proceedings.

As a result of the construction in 1979, Petitioners, Carol M. Captline and Equibank, N.A., co-executors of the Estate of Mike Mazzaro, Deceased commenced the first proceeding against the Respondent in the Allegheny County Court of Common Pleas at No. GD 81-02291 on January 28, 1980, by filing a Petition for Appointment of Viewers alleging that the County had taken property belonging to Mazzaro's estate without just compensation to which the estate was entitled. Viewers were appointed by the lower court the same day. The Respondent responded by filing Preliminary Objections seeking a dismissal of the Co-Executors' Petition for failure to state a cause of action.

On February 6, 1981, the Petitioners initiated a second action by filing a Summons in Trespass against Solomon and Ram in the Allegheny County Court of Common Pleas at GD-03197. The Petitioners thereafter filed a Complaint in which they alleged that Solomon and Ram had wrongfully mined and removed minerals from property belonging to Mazzaro's Estate. Solomon and Ram filed Preliminary Objections to the Petitioner's Complaint in the nature of a demurrer and objecting to the lower court's jurisdiction.

The Preliminary Objections filed in both actions were consolidated for hearing because the factual basis for the claims presented and the controlling legal issues raised by the facts were substantially the same. On September 6, 1981, the parties came before the lower court to stipulate as to certain facts and to argue their positions. Thereafter the Honorable Silvestri Silvestri issued an Opinion and two Orders, both dated October 30, 1981, sustaining the Preliminary Objections of the Respondent and of Solomon and Ram, and dismissing both proceedings.

The Petitioners appealed both Orders. On May 2, 1983,

the Commonwealth Court of Pennsylvania reversed and remanded Judge Silvestri's Order entered in the eminent domain proceeding against the Respondent, but affirmed his Order dismissing the Petitioners' Complaint against Solomon and Ram. The Commonwealth Court of Pennsylvania specifically remanded the case to the Common Pleas Court of Allegheny County to specifically consider the question of whether or not the Notice provided to the Petitioner by the Respondents conformed to the constitutional requirements of due process as provided by the Fourteenth Amendment to the United States Constitution.

Thereafter, on December 19, 1983, the Petitioners herein filed with this Honorable Court a Petition for Writ of Certiorari wherein the Petitioners claim that the decision of the Commonwealth Court of Pennsylvania conflicts with the constitutional mandates of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and *Schroeder v. City of New York*, 371 U.S. 208 (1962).

ARGUMENT

I. THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE REQUISITES FOR REVIEW BY THIS COURT OF "SPECIAL AND IMPORTANT REASONS" ARE LACKING.

A. The Petitioner's Petition for a Writ of Certiorari does not present to this Honorable Court "special and important reasons for review" because the decision of the Commonwealth Court of Pennsylvania provides the Petitioner with the remedy that they are presently seeking before this Honorable Court.

Rule 17 of the United States Supreme Court Rules provides as follows:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important questions of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

This Honorable Court in the case of *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) reflected on the criteria which would constitute "special and important reasons" for granting a

Petition for a Writ of Certiorari.

A...question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations omitted). "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

An appeal should only be allowed in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the appellate courts. *Rice v. Sioux City Cemetery*, supra. It is the position of the Respondent, the County of Allegheny, that the Petitioner's Petition for a Writ of Certiorari does not present to this Honorable Court "special and important reasons for review" because the decision of the Commonwealth Court of Pennsylvania provides the Petitioner with the precise remedy that she is seeking from this Honorable Court.

It is the position of the Petitioner that the decision of the Commonwealth Court of Pennsylvania conflicts directly with the constitutional mandate of this Honorable Court in both *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, (1950) and *Schroeder v. City of New York*, 371 U.S. 201, (1962). The position of the Petitioner is without merit. The Commonwealth Court of Pennsylvania's Opinion clearly reflects a sensitivity to the issue of whether the Respondent took such reasonable steps so as to provide such Notice of Condemnation to Cosgrove Coal which would conform to the due process requirements of the Fourteenth Amendment. The Commonwealth Court opined:

The trial court concluded, and we agree, that there was compliance with the statutory provisions for posting and publication of notice in effect at that time. However, we disagree with the trial court that the evidence presented shows that the notice provided complied with the notice

mandated by the due process clause of the fourteenth amendment. U.S. Const. amend. XIV, §1. In this regard the case of *Curtis v. Redevelopment Authority of Philadelphia*. 482 Pa. 58, 393 A. 2d 377 (1978) is controlling. In *Curtis* an easement holder of record was not given notice of the 1960 condemnation of the servient tenement. The Court, after a review of relevant state and federal cases held:

There was no affirmative burden on (the easement holder) to inspect the servient estate in order to be put on notice by the postings. To the contrary, the burden was on the Authority to conduct a search for recorded interests and then to take reasonable steps to notify holders of such recorded interests. To hold otherwise would countenance the practice of the Authority of ignoring the recording systems of this jurisdiction.

Id. at 65, 393 A.2d at 380 (footnote omitted).

Cosgrove Coal's interest was easily determinable through a simple title search. Thus, the County was required to undertake "reasonable steps" to provide actual notice to Cosgrove Coal. Unfortunately, we are unable to determine what "reasonable steps" would be in this case. The stipulated facts do not disclose whether Cosgrove Coal received actual notice, or whether Cosgrove Coal's mailing address could have been ascertainable. Further evidence is necessary before a determination can be made as to whether posting and published notice alone satisfied the requirements of due process in this matter.

Captline v. County of Allegheny, Pa. Cmwlth., 459 A.2d 1298, 1301, 1302 (1983) and See also Petitioner's Petition for Writ of Certiorari, p. 10a and 11a. It is patently obvious that the Commonwealth Court recognized the importance of the notice requirements mandated by the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV §a.

The Commonwealth Court of Pennsylvania remanded the case to the Common Pleas Court of Allegheny County to specifically consider the question of notice in accordance with

the opinion's treatment of that issue. Captline, supra at 1303 and also the Petitioner's Petition for Writ of Certiorari, p. 13a. It is difficult for this Respondent to comprehend the Petitioner's argument before this Honorable Court. Simply stated, the Commonwealth Court of Pennsylvania recognized that there were certain Fourteenth Amendment due process questions raised by the case and that the trial court, the Court of Common Pleas of Allegheny County, should determine if the notice provided by the Respondent satisfied the mandate of the due process clause of the Fourteenth Amendment. The Petitioners vaguely argue that the Commonwealth Court of Pennsylvania's decision conflicts with the constitutional mandates of *Mullane v. Central Hanover Bank and Trust Co.*, supra and *Schroeder v. City of New York*, supra. Respondent respectfully submits that the Commonwealth Court of Pennsylvania's decision evinces a particular sensitivity to the aforementioned cases which is more fully demonstrated by its order to remand the case to the Common Pleas Court of Allegheny County for a determination of the adequacy of notice provided by the Respondent. In reality, the Commonwealth Court of Pennsylvania has acknowledged the Fourteenth Amendment due process issue and has provided the Petitioners with the precise remedy which they are seeking before this Honorable Court. Therefore, this Honorable Court should deny the Petitioner's Writ of Certiorari.

B. The decision of the Commonwealth Court of Pennsylvania does not conflict with the decisions of this Honorable Court.

The Respondent respectfully submits that the Commonwealth Court of Pennsylvania's decision in this matter is in accord with the decisions of this Honorable Court. Although, the Petitioners argue that the Commonwealth Court's opinion in the matter at hand conflicts with decisions of this Honorable Court, this conflict is more imagined than real. Indeed, in reaching its decision, the Commonwealth Court applied the rationale of the cases cited by the Petitioners favorably to the Petitioners.

The Petitioners' error comes from their attempt to apply these cases to an unrelated second issue. It is apparently the Petitioner's position that the subsurface minerals at issue were not taken by the 1958/1959 proceedings because the

Respondent did not intend to take the subsurface minerals, but even if it did, the condemnation proceeding was defective because it failed to comply with due process. The Common Pleas Court of Allegheny County had decided, inter alia, that (1) the Respondent did intend to take the subsurface minerals, and (2) the notice given comported with the Fourteenth Amendment due process requirements. The Commonwealth Court of Pennsylvania reversed the due process holding, citing *Curtis v. Redevelopment Authority of Philadelphia*, 482 Pa. 393 A. 2d 377 (1978). With respect to the due process question of adequate notice, the Commonwealth Court's opinion in *Captline* and *Curtis* are totally consistent with *Schroeder v. City of New York*, 371 U.S. 308 (1962), *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). The Petitioners are apparently claiming, however, that the Common Pleas Court and Commonwealth Court holdings with respect to what property the Respondent intended to condemn are somehow in direct conflict with and overrule all the constitutional notice requirements enunciated by the United States Supreme Court in *Mullane* and *Schroeder*. The Commonwealth Court ruled in the Petitioners favor on the constitutional notice issue and *Mullane* and *Schroeder* are irrelevant to the issue of how much property the Respondent intended to condemn. There is, therefore, no conflict between the *Captline* decision and the decisions of this Honorable Court. Because the "special and important reasons" criteria of Supreme Court Rule 17 have not been met, the Petitioner's Petition for a Writ of Certiorari should be denied.

CONCLUSION

The decision of the Commonwealth Court of Pennsylvania is in accord with the constitutional mandates of this Court in both *Mullane v. Central Hanover Bank and Trust Company*, supra., and *Schroeder v. City of New York*, supra.

The opinion of the Commonwealth Court clearly evinces a sensitivity to the Fourteenth Amendment due process issue by directly addressing the issue in its opinion and ordering that the case be remanded to the Common Pleas Court of Allegheny County to determine the adequacy of notice provided the Respondents in light of the mandate of the Fourteenth Amendment due process clause. Therefore, not only has the Commonwealth Court properly addressed the issue before this Court, but also has provided the Petitioner with the precise remedy which they are seeking before this Honorable Court.

For all the above stated reasons, this Honorable Court must deny the Petitioner's Petition for a Writ of Certiorari.

JAMES H. McLEAN, Solicitor for the
County of Allegheny, Respondent

SAMUEL P. KAMIN, Assistant Solicitor
for the County of Allegheny, Respondent